

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

NOTICE OF MOTION NO.416 OF 2007

IN

SUIT NO. 770 OF 2006

Padmini Hiralal Jain

and another : Plaintiffs.

versus

Ashok Kumar Mishrilal Jain : Defendant

ALONG WITH

NOTICE OF MOTION NO.1697 OF 2007

IN

NOTICE OF MOTION NO.416 OF 2007

IN

SUIT NO. 770 OF 2006

Padmini Hiralal Jain

and another : Plaintiffs.

versus

Ashok Kumar Mishrilal Jain : Defendant

And

Mrs.Pepibai Mishrimal Jain

and others : Applicants.

Mr.Shashi K.Jain for the Plaintiffs in support of Notice of Motion No.416 of 2007.

Mr.Dinesh C. Shah for Applicants in support of Notice of Motion No.1697 of 2007.

Mr.K.D.Jha for the Defendant.

Mr.Sanjay Jain I/by Ashok Purohit for Parel Mahatma Co-operative Housing Society Limited.

Mr.S.S.Toraskar, Representative of the Court Receiver is present.

CORAM : A.A.SAYED, J

DATED : 14th December, 2007.

P.C.

1. The above Notice of Motion No.416 of 2007 is taken out by the plaintiffs inter alia for appointment of Court Receiver and for injunction restraining the defendant from disposing of and/or alienating and/or encumbering the suit premises viz. Shop No.F/S/M-3-2/19, Parel Mahatma Co-operative Housing society Limited, Jerbai Wadia Road, Bhoiwada, Parel, Mumbai - 400 012. It is also prayed in this Notice of Motion that the plaintiffs be appointed as agents of the Court Receiver and be put in possession of the

suit premises on such terms and conditions as this court may deem fit and proper.

2. The Notice of Motion No.1697 of 2007 is taken out by the applicants, who are the relatives of the defendant and claim to have a share in the suit premises. This Notice of Motion has been inter alia taken out by the applicants for setting aside and modifying order dated 20th March 2007 passed in Notice of Motion No.416 of 2007 and, for staying the effect and operation of the said order. It is also prayed in this notice of motion that the amounts so paid towards the royalty by the defendant pursuant to the said order dated 20th March 2007 be retained by the Court Receiver till the hearing and final disposal of the suit and/or in the alternative the Court Receiver be directed to pay the respective shares from the amounts deposited from time to time by the defendant to the applicants who claim to be the joint owners in the suit premises.

3. The suit has been filed by the plaintiffs inter alia for a declaration that the agreement dated 28th January 2005 (Exhibit A to the Complaint)

between the plaintiffs and the defendant is valid and subsisting and the defendant is bound to specifically perform his part of the said agreement. The plaintiffs have also prayed for a declaration that the plaintiffs are the owners of the suit premises viz. Shop No.F/S/M-3-2/19, situated at ground floor, Parel Mahatma Co-operative Housing society Limited, Jerbai Wadia Road, Bhoiwada, Parel, Mumbai - 400 012. The plaintiffs have further prayed for directions to the defendant to get the said agreement dated 28th January 2005 registered with the Sub-Registrar of Assurances at Mumbai by executing all the necessary documents.

4. The case of the plaintiffs is that by the said agreement of sale dated 28th January 2005, the defendant had agreed to transfer the suit premises to the plaintiffs for Rs.10 lakhs. It is averred in the plaint that the defendant on receipt of the said amount and on execution of the said agreement put the plaintiffs in exclusive possession of the suit premises. It is also stated that the defendant handed over to the plaintiffs the original share certificate. A power of attorney of the same date i.e. 28th

January 2005 was also executed by the defendant in favour of the plaintiffs authorising them to perform various acts deeds and things in respect of the suit premises. The defendant had also executed an affidavit confirming the said sale and relinquishing all his right title and interest in the suit premise in favour of the plaintiffs. The said affidavit is also dated 28th January 2005.

5. It is however the case of the plaintiffs that the defendant thereafter represented to them that since the defendant was doing business in the suit premises and he had to recover amounts from his customers in the market, he may be allowed to continue in possession of the suit premises for some time. It was mutually agreed that the possession of the suit premises be given to the defendant for a period of 11 months as their licensee on monthly compensation of Rs.5000/- and that after expiry of the licence period the defendant would hand over the possession of the suit premises to the plaintiffs. Accordingly an agreement of leave and licence dated 1st February 2005 (approximately 3 days after 28th January 2005

when the agreement of sale and other documents were executed) came to be entered into and the defendant was allowed to use and occupy the suit premises as licensee. The said document of leave and licence agreement was not registered and, according to the plaintiffs, the defendant, on one pretext or the other, failed to register the said document and to pay the deficit stamp duty. After expiry of leave and licence agreement period on 31st December 2005, the defendant however failed and neglected to hand over the possession of the suit premises to the plaintiffs and refused to sign necessary transfer form and also refused to perform his part of the said agreement of sale. The plaintiffs, therefore, by their advocate's letter dated 27th February 2006 called upon the defendant to comply with his part of the said agreement of sale dated 28th January 2005 and also demanded possession of the suit premises from the defendant.

6. According to the plaintiffs, they are ready and willing to perform their part of the said agreement of sale and have already paid the entire consideration. However, the defendant is not ready and willing to perform his part of the

said agreement of sale. It is the case of the plaintiffs that though the said agreement of sale dated 28-01-05 is valid, subsisting and binding on the defendant and the leave and licence agreement dated 1st February 2005 had also come to an end, the defendant is not entitled to continue in use and occupation the suit premises in any manner whatsoever.

7. Hitherto the plaintiffs had taken out a notice of motion bearing Notice of Motion No.810 of 2000 which was disposed of by an order dated 18th December 2006 wherein this Court came to the conclusion that since the suit premises were valued incorrectly, no relief was granted in the said notice of motion. However, a liberty was granted to the plaintiffs to take out a fresh notice of motion for similar relief after valuing the suit premises correctly. A reference to this notice of motion made in the affidavit filed in the above Notice of Motion No.416 of 2007 is relevant for the purpose of deciding the above notices of motion, particularly about the inconsistent stand taken by the parties.

8. Pursuant to the liberty granted by the

order dated 18th December 2006, after paying enhanced court fees, the plaintiffs have taken out the above Notice of Motion No.416 of 2007.

9. The defendant has opposed this notice of motion and filed his reply. The case of the defendant is that the suit has been fraudulently filed by the plaintiffs by manipulating, fabricating and using colorable documents deliberately with ulterior motives and that the signatures of the defendant and his brothers on all the documents annexed to the plaint except Exhibit 'B' are forged. According to the defendant, the Plaintiff No.2 is a jeweller by profession and he has his two jewellery shops in the same vicinity and are well known to the defendant and that they are in the same trade and having business relations. The case of the defendant is that it is usual among the jewellers to borrow some money or gold if required, to comply with the demands of the customers and all such dealing usually are in cash and are in good faith.

10. According to the defendant, he carries on his joint family business as jewellers at the

suit premises. It is his case that in or about 1990-91 a loan of Rs.7,00,000/- was taken by the defendant at the interest rate of 18% per month from the plaintiffs and that he was regularly paying the interest to the plaintiffs till Diwali of 2003. However, thereafter due to some financial difficulties, there were some defaults in payment of interest to the plaintiffs. It is the case of the defendant that in or about 1st week of January 2005, amicable settlement took place between the parties and after deducting the outstanding amount of interest from Diwali 2003 onward additional sum of Rs.11,50,000/- was further paid by the plaintiffs in cash and on record a total of Rs.13,00,000/- was shown, as Rs.1,50,000/- was adjusted against the aforesaid outstanding amount of interest and, accordingly, total amount of Rs.20,00,000/- were lent by the plaintiff to the defendant and the rate of interest was fixed at 12 percent. Accordingly, in view of the aforesaid settlement, the defendant was paying a sum of Rs.20,000/- in cash towards the interest regularly and the same has been paid till December 2005. The defendant's original share certificate in respect of the suit premises, was retained by the plaintiff as the

security.

11. The plaintiff, according to the defendant, in the month of January 2006, surprisingly demanded the entire loan amount of Rs.20,00,000/- at once failing which the plaintiff threatened to take forcible possession of the suit premises. In view of this, the defendant lodged police complaints against the plaintiffs. It is stated by the defendant that this dispute between the parties however was settled by intervention of the police authorities and the said settlement was recorded in writing on 12.2.2006 in Hindi, hand written by Suresh Jain i.e. defendant's elder brother and the said settlement was duly signed at the R.A.K. Marg Police Station, Sewri, Mumbai. The copy of the said settlement along with necessary English translation is annexed to the affidavit in reply of the motion. It is further stated that the advocate's Notice dated 27.2.2006 from the plaintiffs was received and replied to by the defendant's advocate letter dated 3.3.2006. According to the defendant, it is in these circumstances and instead of filing money recovery proceedings, the plaintiffs have chosen

to file the above suit by manipulating, fabricating and forging the documents for the entire amount at one stretch from the defendant. It is further stated that the story put forth by the plaintiffs that they were in physical possession of the suit premises for a period of three days i.e. from 28.1.2005 to 1.2.2005 is false and cannot be believed.

12. The defendant has further pointed out that the plaintiff has filed a suit for eviction bearing Suit No.30/39 of 2006 against the defendant before the Small Causes Court at Bombay on 25.4.2006 and, the same is pending till date. According to the defendant he was always in physical possession of the suit premises and he has never handed over the physical possession of the suit premises to the plaintiffs till date in spite of the aforesaid settlement dated 12.2.2006 as later on the plaintiffs backed out from their commitments. Thus, even though under the settlement dated 12-02-2006, Room No.19, II floor, J.V.Road, Parel, Bhoiwada, Mumbai - 12 was to be handed over to the plaintiffs in lieu of the borrowed amount since the plaintiffs backed

out of the settlement, the possession of the said room was not handed over to them. According to the defendant, the suit is bad for non-joinder of necessary parties as the defendant is not absolute owner of the suit premises and, therefore, the suit is not maintainable.

13. In the rejoinder it is pointed by the plaintiffs that it is for the first time the defendant is making a false charge of forgery and fabrication of documents against the plaintiffs which is in direct contradiction to the defendant's earlier Affidavit-in-Reply dated 14th June 2006 made on oath in the Notice of Motion No.810 of 2006 in the above suit. According to the plaintiff, in the said Affidavit-in-Reply the defendant has confirmed that Exhibit A to E to the plaint bear his signatures and that of his two brothers as witnesses and, therefore, as the defendant is making false statements on oath, the same cannot be believed. According to the plaintiffs, the said transaction of Rs.20 lakhs, which is referred to in the Affidavit-in-Reply is a different loan transaction which is not between Plaintiff No.1 and the defendant but that is between the plaintiffs and defendant's brother

Suresh Kumar Jain and this would be clear from the document at Exhibit 1-A annexed to the Affidavit-in-Reply of the defendant which is in the hand writing of the said Suresh Kumar Jain. The plaintiffs have stated that the said document at Exhibit 1-A which is the alleged settlement Agreement was executed under coercion and use of force by Police officers of RAK Marg Police Station and the said document was executed as they were threatened of being put behind the bars. It is further stated that the premises mentioned in the said document at Exhibit 1-A i.e. Room No.19, 2nd floor, J.V.Road, Parel, Bhoiwada, Mumbai 400 012, is altogether different from the suit premises. Exhibit 1-A records that the above referred premises is standing in the name of Suresh Kumar's brother's wife i.e. Sushila Kantilal Jain. Thus the alleged settlement was executed under coercion and was no way concerned with the subject matter of the present suit. It is further pointed out that the defendant has clearly admitted that he had borrowed money of Rs.20 lakhs from Plaintiff No.1. It is further stated that the defendant however admits the receipt of Rs.10 lakhs at the time of execution of agreement dated 28th January

2005 (Exhibit-A to the plaint) and admits in his reply that he borrowed additional loan of Rs.20 lakhs from plaintiff No.1 and, that these two transactions are completely separate and independent from each other.

14. Affidavit in Sur Rejoinder has been filed by the defendant. The contrary stand in respect of the signatures of the documents has been sought to be explained by the defendant by stating that the 'admissions' should not be considered against the defendant as it appears to have been made by his previous Advocate under mis-understanding contrary to his instructions. Further, in para 10 of his sur-rejoinder the defendant has denied that the settlement deed dated 12.2.2006 refers to some different transaction. It is further pointed out that the plaintiffs have already filed another suit claiming recovery of Rs.10 lakhs against the defendant's brother Suresh Kumar Jain and have obtained certain orders which has been challenged by Suresh Kumar Jain by filing appeal before this Court.

15. It may be mentioned that in the above

Notice of Motion No.416 of 2007, by an order dated 20th March 2007, this Court, after considering the prima facie case of the plaintiffs, appointed Court Receiver in respect of the suit premises and directed the Court Receiver to take symbolic possession of the suit property without disturbing the possession of the defendant and, further directed the Court Receiver to proceed with the determination of the terms and conditions on which the defendant would continue to occupy the premises as an agent of the Court Receiver including the question of royalty which was left to the Court Receiver to decide.

16. Later on, the applicants, who are the relatives of the plaintiffs, on or about April 2007 filed the above Notice of Motion No.1697 of 2007 praying for the reliefs as set out therein and to set aside and modify the order dated 20th March 2007. In the affidavit in support of this Notice of Motion No.1697 of 2007, it is alleged that the applicants are the co-owners of the suit premises and the suit premises is censused premises and was censused in the name of their deceased father, and the applicants and their

children have equal rights duly inherited from their deceased father Shri Mishrimal Seshmal Jain (alias Porwal) who expired in Rajasthan on 26.07.1990. According to the applicants, in or about 1991-92, the deceased Shri Mishrimal Seshmal Jain was the member of the said society viz. Parel Mahatma Co-operative Housing Society, Mumbai and the monthly maintenance bills were also issued in the name of said Mishrimal Seshmal Jain. The applicants claimed ignorance as to how monthly bills and other records of the society now appear in the name of the defendant. The applicants allege that the defendant, in collusion with the plaintiffs, has got the monthly bills and records of the said society in his name. According to the applicants, they are carrying on their joint family business of jewellers in the suit premises and the electric bills till date also stand in the name of their deceased father. It is stated by the applicants that the telephone connection in the suit premises is also in the name of Applicant No.4 Rameshkumar Mishrimal Jain and their business is being carried out in the name and style of M/s.Sharda Jewellers in the suit premises and, the shops and establishment licence in respect of

the said business has been renewed from time to time and the same is valid and subsisting till date. In para 11 of the affidavit, the applicants have stated that their deceased father had obtained Money Lending Licence in the name of M/s.Sharda Jewellers which was ultimately discontinued after the year 2002-03. The applicants have further stated in their affidavit that they came to know about certain loan transaction between the defendant and plaintiffs in February 2006 and then they intervened in the matter, negotiated and got the matter settled on 12.2.2006 and, the same was recorded in Hindi by Sureshkumar Jain and, they came to know about the suit transaction when the Court Receiver came to their residential premises to enquire about the defendant and that is how they came to know about the order dated 20th March 2003 of appointment of Court Receiver passed by this Court in respect of the suit premises. The applicants have stated that upon enquiry with the defendant, they came to know that the defendant had filed an appeal challenging the said order dated 20th March 2007 and the same has been withdrawn by the defendant. Thus, according to the applicants, the defendant is not a sole and absolute owner of the suit

premises and they have interest in the suit premises and, therefore, they have taken out present Notice of Motion No.1697 of 2007 for setting aside and modification of the order dated 20th March 2007 appointing Court Receiver in respect of the suit premises.

17. Affidavit in Reply dated 11th June 2007 has been filed by the plaintiffs to this Notice of Motion No.1697 of 2007 wherein it has been stated by the plaintiffs that the appeal filed by the defendant came up for admission before the Division Bench of this Court on 20th April 2007 and the Court was pleased to take a very serious note of the matter in view of the derogatory remarks made by the appellant/defendant in the grounds of appeal and, therefore, ultimately, the said appeal came to be withdrawn unconditionally by the defendant. It is stated that having failed to get the said order of appointment of Court Receiver set aside, the defendant has put the applicants, who are none other than the defendant's mother and brothers and other relatives and, filing of this Notice of Motion 1697 of 2007 is nothing but an abuse of process of court and, there was complete collusion

between the defendant and the applicants. In para 23 of the affidavit in reply it is pointed out that the alleged writing of settlement dated 12.2.2006 specifically refers to three cheques which were issued by the applicants and the same were signed by applicant No.7 which is in respect of different transaction and is independent transaction from the subject matter of the present suit which is in respect of the agreement of sale in respect of the suit premises. It is stated that the plaintiffs have filed criminal cases under sections 138 of the Negotiable Instruments Act in the Court of Metropolitan Magistrate, 7th Court, Dadar, Mumbai in respect of the said three cheques which came to be dishonoured. It is further stated that the Applicant Nos.4 and 5, who are the brothers of the defendant, are the witnesses to the agreement of sale dated 28th January 2005 (Exhibit-A to the Complaint) and other documents and as such they are aware of the sale transaction and they were also the witnesses to the Power of Attorney and the affidavit executed by the defendant and, therefore, it cannot be said that they were not aware of the transaction between the plaintiffs and the defendant and in fact they have endorsed

the said agreement by signing it as witnesses. It is further stated in Para 26 of the reply that the suit premises came to be transferred in favour of the defendant with the knowledge and concurrence of all parties and hence question of any interest or ownership right of the applicants does not arise and prayed for dismissal of Notice of Motion No.1697 of 2007.

18. Rejoinder dated 5th July 2007 thereof has been filed by the applicants denying that the suit premises were transferred during the life time of their deceased father Mishrimal Seshmal Jain. It is further stated in the said rejoinder that the cheques referred to, were given to the plaintiffs as and by way of security and the plaintiffs had now deliberately misused them by getting the same dishonoured and filing the proceedings under Section 138 of the Negotiable Instruments Act.

19. The above Notice of Motion No.416 of 2007 and Notice of Motion No.1697 of 2007 came up before this Court on 13th July 2007 when the order dated 20th March 2007 of appointment of Court Receiver was modified to the extent that

the decision of fixing of royalty by the Court Receiver was deferred until further orders in the said notices of motion.

20. The Notices of Motion were heard for some time on 24.08.2007 and were made part-heard. On 29.9.2007, when further arguments on the above notices of motion were to resume, learned counsel Mr.Sanjay Jain appeared on behalf of one Parel Mahatma Co-operative Housing society Limited, Jerbai Wadia Road, Bhoiwada, Parel, Mumbai - 400 012 and sought to intervene in the matter and sought time. However, since the Notices of Motion were partly heard and in absence of any application for intervention, I was not inclined to adjourn the motions and proceeded to hear the motions.

21. I have heard the Learned Counsel for the parties including Learned Counsel Mr.Sanjay Jain for the Society.

22. The Ld. Counsel for the plaintiffs has taken me through the relevant portions of the pleadings and submitted that the Court Receiver appointed in respect of the suit premises be

continued and further pressed that the plaintiffs be put in possession of the suit premises as an agent of the Court Receiver. He has invited my attention to the inconsistent stand taken by the defendant in the pleadings in the Notice of Motion No. 416 of 2007 and the earlier Notice of Motion No. 810 of 2006. It is further submitted by him that the receipt of the amount of Rupees Ten lacs has not been disputed by the defendant.

23. The Ld. Counsel for the defendant also took me to the relevant portions of the pleadings and contended that the Agreement of Sale in question is not registered and therefore does not affect any rights of the defendant in the suit premises and has invited my attention to the relevant provisions in the Registration Act. He has also invited my attention to the relevant provisions under the Stamp Act, as the document has not been stamped. He has further invited my attention to Order XL of CPC and particularly to sub-clause (2) of Rule 1 which provides that nothing in Rule 1 shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The Ld Counsel has

further submitted that the plaintiffs have falsely stated that the possession of the suit premises was with them between 28th January 2005 i.e. the date of the alleged Agreement of Sale and 1st February 2005 i.e. the date of the alleged Leave and License Agreement, and the possession of the suit premises has never been parted with and the same was always in possession of the defendant. The Ld. Counsel has therefore urged that since the plaintiffs have come to court based on a false statement, the plaintiffs cannot be granted any reliefs. He has relied upon the case of **S.P.Chengalvaraya Naidu vs. Jagannath** reported in (1994) 1 SCC pg 1 and invited my attention to last portion of para 5 of the said judgment wherein it has been held that a person who's case is based on falsehood has no right to approach the court and he can be summarily thrown out at any stage of the litigation. It is further contended by him that the transactions of loans which have been given by the plaintiffs to the defendant and his family is sought to be misused and taken advantage of by the plaintiffs and instead of filing a regular suit for recovery of amount of loan, the plaintiffs have chosen to file the above suit by

fabricating and manipulating forged documents. The Ld. Counsel also referred to other proceedings filed by the plaintiffs in the Small Causes Court, Metropolitan Court and other proceedings in this Court. It is further contended that the disputes between the parties were settled by intervention of police at R.A.K. Marg Police Station, Sewree and he relied upon the writing dated 12-02-2006, which is in the hand writing of the defendant's brother Shri Suresh Jain whereby the defendant and the Applicants had agreed to handover one Room No. 19, 2nd Floor, Hende building, J.V. road, Parel, Bhoiwada, Mumbai-12 to the plaintiffs in full and final settlement on the plaintiffs returning to them all the documents. However it was contended that the plaintiffs backed out of the settlement.

24. The Ld. Counsel for the Applicants submitted that the Applicants are co-owners of the suit premises and the pitch card thereof stood in the name of the deceased Shri Mishrimal Sheshmal Porwal alias Jain and the defendant has no right to sell the suit premises and that the Applicants came to know about the alleged transaction only when the representative of the

Court Receiver came to their residential premises to enquire about the defendant and that is how they have taken out the above Notice of Motion No. 1697 of 2007 to set aside and modify the order dated 20th March 2007 passed in Notice of Motion No. 416 of 2007.

25. The Ld. Counsel for Parel Mahatma Co-op Housing Society Ltd. submitted that the suit premises are situate in the building belonging to Parel Mahatma Co-op Housing Society Ltd. of which the defendant is a member and the plot in which the suit premises is situate is declared as "slum area" under the Maharashtra Slums Areas (Improvement, Clearance and Redevelopment) Act, 1971 and the defendant had no right to create third party rights in respect of the suit premises. He submitted that the suit building is likely to be demolished soon and it was the anxiety of the Society that the SRA scheme for redevelopment covering the suit building should not be stalled because of the present dispute between the parties.

26. I have considered the rival contentions of the parties. It is not disputed by the

defendant that the plaintiffs have paid a sum of more than Rs.10 lacs to the defendant in cash. The only dispute is whether the amount covers the consideration of Rs.10 lacs under the subject Agreement of Sale or whether the said sum of Rs.10 lacs forms part of the loan taken by the defendant from the plaintiffs. In my view this question along with other questions of law would ultimately be decided at the time of hearing of the suit and upon adducing evidence in the matter. Prima facie there is an Agreement of Sale which was at the threshold an admitted document, and which contained the signatures of not only the defendant, but also of his two brothers i.e. Shri Sureshkumar M. Jain and Shri Ramesh Kumar M. Jain, as witnesses. They have also signed the Irrevocable Power of Attorney and the Affidavit as witnesses. The said persons are also the Applicant Nos.5 and 4 respectively in the Notice of Motion No.1697 of 2007. It is also noted that the Agreement of Sale and the Affidavit are also signed by Advocate Shri D.J. Khatri and the Irrevocable General Power of Attorney is attested by the said Advocate Shri D.J. Khatri as Notary Public. Pertinently no documents in regard to the alleged loans are

relied upon by the defendant.

27. The statements made by the defendant in the pleadings regarding the execution of the Agreement of Sale in question are also significant. In the earlier Notice of Motion No. 810 of 2006 in the above suit, which was disposed of, the defendant in para 4(a) of the affidavit in reply has stated thus :-

"....I say that I and my brother in good faith and because of friendly relationship signed various documents made by the Plaintiff which is annexed to the copy of Plaint as agreement of sale, affidavit and power of attorney"

28. However, in the above Notice of Motion No. 416 of 2007, with perhaps a change in Advocate, the stand of the defendant has changed and in para 4 of the affidavit in reply it is stated as follows:-

"..... I further say that all the documents annexed to the Plaint except Exhibit 'B' are manipulated and

fabricated by the Plaintiff and the signature has been forged. I further say I neither my brother Suresh Jain nor me has signed the subject Exhibits annexed to the plaint."

29. These contrary statements of the defendant are rather curious. Once having admitted his signatures on the documents in question including the Agreement of Sale, even if it is assumed that they are obtained by the plaintiffs under misrepresentation as stated by the defendant, the defendant cannot now be heard to say that the Agreement of Sale is forged, which charge is a serious offence under the Indian Penal Code, 1860. Pertinently this change in stand to get over the admissions made, is sought to be explained by the defendant by laying the blame on the previous Advocate. I find this highly deprecable. In this regard the averment in Para 6 of the Sur-rejoinder of the defendant is reproduced herein below :-

"It is further pertinent to note that my previous Advocate appears to have made certain admissions in my affidavit in

reply to plaintiff's previous Notice of Motion bearing No.880 of 2006 under misunderstanding as I had never instructed him to admit anything except execution of Exhibit "B" to the plaint and therefore all such admissions, if any, should not be considered against me in the above matter"

The change in stand of the defendant, in my view, is an afterthought and merely an attempt to deny any reliefs being granted to the plaintiffs.

30. The case of the plaintiffs in respect of possession of the suit premises is also far from satisfactory. In the Plaint in para 1 it is stated thus:-

"..... On receipt of the said amount and on execution of said Agreement put the plaintiffs in exclusive possession of the suit premises."

31. However in the letter dated 27-02-06 written by the Advocate for the plaintiffs to the defendant which is annexed as Exhibit 'F' to the

Plaint, it is stated in para 3 as follows:-

".... You have also failed and neglected to handover to my clients the possession of the said shop in spite of repeated requests by them in this regard."

32. Thus, the plaintiffs have also not come clean on the issue of possession of the suit premises for the 3 days i.e. the period when the Agreement of Sale dated 28th January 2005 was executed and the Leave and Licence Agreement dated 1st March 2005 was executed, for which period, it is alleged by them that they were in possession. Prima facie, I am not satisfied that the plaintiffs were in possession of the suit premises at any time. I am therefore not inclined to consider the prayer of the plaintiffs to put them in possession of the suit premises as agent of the Court Receiver.

33. In so far as Notice of Motion No.1697 of 2007 is concerned, the same is taken out "In" Notice of Motion No.416 of 2007, by the Applicants, who are close relatives of the defendant. In my view, this Notice of Motion

No.1697 of 2007 is filed, merely to cause obstruction and create hurdle in the reliefs granted to the plaintiffs in the order dated 20th March 2007 whereby the Court Receiver was appointed in respect of the suit premises. There is no explanation as to why till date the Applicants have not filed any application to implead themselves as party defendants in the above suit or objected to the share certificate of the society being transferred in the name of the defendant alone, if they claim to have any right in the suit premises. In my view, the Notice of Motion No.1697 of 2007 is an abuse of process of Court.

34. As far as the Society is concerned, it may be clarified that in absence of any written application on record, I do not want to express any opinion in the matter. Suffice it to say that the society is at liberty to make such application as it so desires in regard to their apprehensions that the SRA project of redevelopment is likely to be affected and/or delayed because of the present dispute.

35. Having heard the Ld.Counsels and having

considered the rival contentions of the parties and on perusal of the pleadings and material placed before me I am satisfied that the plaintiffs have made out a prima facie case for grant of interim reliefs. Moreover weighing all the factors, including the payment of entire consideration under the Agreement of Sale by the plaintiffs, I find that the balance of convenience is in favour of the plaintiffs and irreparable injury would be suffered by them if reliefs are not granted to them. The suit premises, which is admittedly in possession of the defendant, is also required to be preserved pending the hearing and final disposal of the suit and it would be just and convenient that the appointment of the Court Receiver is continued in respect of the suit premises subject to payment of royalty, by the defendant to the Court Receiver. I am also inclined to allow the plaintiffs to withdraw the royalty amount subject to their furnishing security, as I find that under the Leave and Licence Agreement the defendant had agreed to pay monthly licence fees to the plaintiffs. Hence I pass the following order :-

:ORDER:

(i) Court Receiver appointed in respect of the suit premises being Shop No. F/S/M-3-2/19, Parel Mahatma Co-operative Housing society Limited, Jerbai Wadia Road, Bhoiwada, Parel, Mumbai - 400 012 vide Order dated 20th March 2007 is continued, pending final hearing and disposal of the suit.

(ii) The defendant's possession shall not be disturbed and he shall continue to be in possession of the suit premises as an agent of the Court Receiver, High Court, Bombay.

(iii) The Court Receiver shall determine the terms and conditions including the royalty amount payable per month by the defendant after hearing the parties. Until fixation of the royalty by the Court Receiver, ad-hoc royalty is fixed at Rs.5,000/- per month to be paid by the defendant to the Court Receiver.

(iv) The defendant shall pay the royalty amount to the Court Receiver regularly each month and the plaintiffs shall be entitled to withdraw

those amounts subject to deductions of the Court Receiver's costs, charges and expenses and subject to the plaintiffs furnishing security to the satisfaction of the Court Receiver in respect of withdrawal of the royalty.

(v) In so far as Notice of Motion No. 1697 of 2007 is concerned, the said Notice of Motion seeks to set aside and modify the order dated 20th March 2007 in Notice of Motion No. 416 of 2007. In view of the disposal of the Notice of Motion No. 416 of 2007 finally by this order, the challenge/modification sought to the said order dated 20th March 2007 would be rendered infructuous.

(vi) The Notice of Motion No. 416 of 2007 and Notice of Motion No. 1697 of 2007 are disposed of accordingly with costs.

36. It is made clear that the views expressed in this order are only prima facie and should not be taken into consideration in deciding the issues in these proceedings and other proceedings finally between the parties.

37. On oral application of learned counsel Mr.Jha for the defendant, the operation of this order is stayed for a period of six weeks from today.

(A.A. Sayed J.)